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## Activism and Restraint within the UK Supreme Court

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### ABSTRACT

This article provides evidence for the extent to which the UK Supreme Court as a body - and Supreme Court Justices as individuals - have displayed an activist or restrained attitude to their decision-making role. Taking October 2009 as the starting point (when the UKSC came into existence) the article surveys the degree to which the Court and individual Justices have (1) departed from precedents, (2) interpreted legislation in unanticipated ways, (3) rejected the government's position on matters of social, economic or foreign policy, and (4) developed the common law. The article concludes that, while the Supreme Court as a whole remains as conservative as the Appellate Committee of the House of Lords which preceded it (with the possible exception of its approach to immigration law), there are notable differences between the attitudes of individual Justices, one or two of whom appear to be straining at the leash.

### 1. INTRODUCTION

The UK Supreme Court is now well into its sixth year and has issued more than 350 decisions to date. Already a total of 21 judges (20 men and only one woman) have served as Justices, excluding those who have occasionally sat in an *ad hoc* capacity (the Lord Chief Justice, the Master of the Rolls and retired Justices). There is therefore ample material to attempt an assessment of the activism within the Court. There has been considerable debate in academic circles as to the meaning of 'judicial activism', but I do not intend to rehearse the various views here.[\[2\]](#) For present purposes I will focus on four types of judicial behaviour which I believe would, in virtually everyone's opinion, constitute activism. They each display an attitude which evinces an intention to develop the law rather than just apply it, to provide guidance for the future rather than just supply reassurance concerning the *status quo*. The article assumes a value-neutral use of the term 'activism', one which does not presuppose the adoption of any particular ideological approach to the role of judges: it focuses instead on the unexpectedness of judicial pronouncements. To that extent the article is intended to provide a very small supplement to the masterly account by Alan Paterson of the various dialogues in which our Supreme Court Justices engage before they reach their conclusions; [\[3\]](#) my focus, however, is much more on the nature of the conclusions reached than on the methods employed to get there.

### 2. DEPARTING FROM PRECEDENTS

If we take as our first marker of activism the Supreme Court's attitude to its own previous decisions or those of the House of Lords and Court of Appeal, we can see that the activism displayed is slight. When the new Court was established in October 2009 no mention was made in any legal document of the approach it would adopt to the doctrine of precedent, but just six months into its life the Court had to face the issue in a housing law case, *Austin v Southwark LBC*. [\[4\]](#) The applicant was claiming that on a proper interpretation of section 82(2) of the Housing Act 1985 a secure tenancy did not come to an end merely because the tenant had not paid the arrears of rent by the stipulated date. He asked the Supreme Court to depart from the contrary view, which had been adopted by the Court of Appeal in *Thompson v Elmbridge BC* [\[5\]](#) and approved by the House of Lords in both *Burrows v Brent LBC* [\[6\]](#) and very recently in *Knowsley Housing Trust v White*. [\[7\]](#) Lord Hope, the Deputy President of the Supreme Court, referred to the 1966 Practice Statement issued by the House of

Lords, which said that the House would normally treat its former decisions as binding but would depart from them 'when it appeared right to do so'. [\[8\]](#) He then added:

The Supreme Court has not thought it necessary to reissue the Practice Statement as a fresh statement of practice in the court's own name. This is because it has as much effect in this court as it did before the Appellate Committee of the House of Lords. It was part of the established jurisprudence relating to the conduct of appeals in the House of Lords which was transferred to this court by section 40 of the Constitutional Reform Act 2005. [\[9\]](#)

In fact, section 40 of the 2005 Act makes no mention of either 'established jurisprudence' or 'the conduct of appeals'. Lord Hope's conclusion as to the effect of the 1966 Practice Statement in *Austen* - which was that the law should be left as it was because the effects of reversing it were 'incalculable' [\[10\]](#) - was therefore not inevitable. [\[11\]](#) He might have been wiser, with respect, to seek to justify the substance of the Statement *per se*.

It is curious how infrequently the Practice Statement has been referred to in subsequent Supreme Court decisions. In fact there appears to be just one citation. This was in *Jones v Kaney*, [\[12\]](#) where a seven-judge court overturned (by 5 v 2) the longstanding rule that an expert witness could not be sued for negligence. In doing so the majority 'distinguished' the House of Lords' old decision in *Watson v M'Ewan* [\[13\]](#) on the basis that its focus was liability for slander, not liability for negligence. But Lord Hope and Lady Hale, both dissenting, thought that the ratio of *Watson v M'Ewan* went wider and that, rather than the courts interfering with precedent, the matter should be looked at by the Law Commissions. The Practice Statement is cited at the start of Lady Hale's judgment and she comments that the case before her 'illustrates how hard it is to apply that wise guidance in practice'. [\[14\]](#) From a Lexis search, it seems that the Practice Statement was cited to the Court in one other case, *Kennedy v The Charity Commission*, [\[15\]](#) which was about whether public authorities have a general duty to disclose information to the public. Presumably the appellant journalist wanted the Supreme Court to depart from the position it had adopted in *BBC v Sugar (No 2)*, [\[16\]](#) where it confirmed that there was no such general duty under Article 10 of the ECHR. But the Supreme Court Justices refused to do so and found no need to refer to the Practice Statement in their judgments.

Nevertheless, without expressly referring to the Practice Statement, the Supreme Court has certainly departed from House of Lords precedents on several occasions. It first did so in 2011 and has repeated the behaviour on five occasions, three of them in 2014. In *R (Cooper) v Secretary of State for Work and Pensions* [\[17\]](#) the Supreme Court impliedly disapproved of the decision of the House of Lords in *Mulvey v Secretary of State for Social Security* [\[18\]](#): the Supreme Court ruled that deductions could *not* continue to be made from a person's social security benefits after a debt relief or bankruptcy order had been made against the debtor. In *Smith v Ministry of Defence*, [\[19\]](#) which was about whether UK soldiers serving abroad are entitled to expect that the Ministry of Defence will protect their rights under the Human Rights Act 1998, a seven-judge Supreme Court unanimously held that they are so entitled. In doing so the Justices (by 6 v 3) refused to follow the Court's own previous decision just three years earlier in *R (Smith) v Oxfordshire Assistant Deputy Coroner* [\[20\]](#) because in the interim the European Court of Human Rights, in *Al Skeini v UK*, [\[21\]](#) had changed the way the ECHR was to be applied extra-territorially. Of the five judges who sat in both *Smith* cases, Lords Hope and Walker were the two whose opinions changed the most during the short period between them.

The first of the three 2014 decisions was *R (Barkas) v North Yorkshire County Council*, [\[22\]](#) a case on whether land could be registered as a town or village green under the Commons Act 2006. On the

facts, the Supreme Court held that the land in question (which was actually a beach) could not be so registered and in the process it disapproved of the decision of the House of Lords in *R (Beresford) v Sunderland City Council*. [23] The second decision was *FHR European Ventures LLP v Cedar Capital Partners LLC*, [24] which concerned the capacity in which an agent who sells shares holds the money he or she has received for those shares. In ruling that the agent was a constructive trustee the Supreme Court departed from a nineteenth century decision of the House of Lords in *Tyrrell v Bank of England*. [25] Thirdly, in *R (Kaiyam) v Secretary of State for Justice* [26] the Supreme Court accepted that the House of Lords' decision in *R (Walker) v Secretary of State for Justice* [27] should be departed from because it had since been successfully challenged in the European Court of Human Rights in *James v UK*. [28] Along with the *Smith* case mentioned in the previous paragraph, this constitutes the second time the Supreme Court has adhered to a Strasbourg decision in preference to one by itself or its predecessor body.

The most recent example of the Supreme Court moving away from an approach favoured by the House of Lords is the 2015 medical negligence case of *Montgomery v Lanarkshire Health Board*. [29] Allowing Ms Montgomery's appeal, the Supreme Court held that in cases where a doctor has not explained the risks of a procedure to a patient (here the risks of shoulder dystocia when a diabetic woman is giving birth) it was no longer appropriate to apply the test laid down by the House of Lords in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*. [30] According to that test, whether a doctor's failure to warn a patient of the risks of treatment was a breach of the duty of care was normally to be determined by whether the omission was accepted as proper by a responsible body of medical opinion which could not be rejected as irrational. [31] The Supreme Court pointed out that today's patients expect to be told a lot more about their treatment than in years gone by, so that they can decide for themselves whether to proceed: here Ms Montgomery would have opted for a caesarean operation had she known the risks of shoulder dystocia.

In *R (Hodkin) v Registrar General of Births, Deaths and Marriages* [32] the leapfrog appeal mechanism was used to allow the Supreme Court to consider the Court of Appeal's 1970 decision in *R v Registrar General, ex parte Segerdal*, [33] where the judges effectively held that Scientology was not a religion. By 2013 the Supreme Court had become more broad-minded: it overruled the earlier case and found that Scientology *was* a religion because it could be described as a belief system which goes beyond sensory perception or scientific data and claims to explain mankind's place in the universe and relationship with the infinite and to provide a guide for its adherents as to how to live their lives in conformity with the spiritual understanding associated with the belief system. There are other instances of the Supreme Court having overruled (as opposed to reversing) Court of Appeal decisions, but *Hodkin* stands out as the one which displays an altogether more modern approach to an old question.

Whether the Supreme Court gets the opportunity to re-visit its own precedents or those of the House of Lords is dependent on which matters are litigated to that high level and on what arguments are presented to their Lordships by barristers from each side. We could learn much more about the Supreme Court's attitude to precedents if we were supplied with detailed reasons as to why applications for permission to appeal are rejected by the three-member committees of Justices which consider the applications. [34] From the information made public we cannot tell how many applications fail because the committee is convinced that an existing precedent does not need to be re-examined 'at this time'. [35]

### 3. INTERPRETING LEGISLATION IN UNANTICIPATED WAYS

The Supreme Court inherited the principles of statutory interpretation applied by the House of Lords. These require the Justices to interpret legislation in accordance with the purpose it was intended to achieve, but they must also bear in mind supplementary principles such as the need to resolve any ambiguity in a way which more clearly complies with the UK's obligations under treaties it has ratified or under international customary law. They have to bear in mind as well section 3 of the Human Rights Act 1998, which requires all legislation to be interpreted, 'so far as it is possible to do so', in a way which makes it compliant with European Convention rights.

An important step forward in the law's attempts to combat domestic violence was taken by the Supreme Court in *Yemshaw v Hounslow LBC*. [36] Section 177(1) of the Housing Act 1996 stated that 'It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence or other violence..', and the Supreme Court interpreted this as meaning that a claimant who had not yet suffered any physical violence, nor any threat of such violence, could still take advantage of the provision. The phrase 'domestic or other violence' was unexpectedly taken to include any other form of abuse which, directly or indirectly, might give rise to the risk of harm.

The high-profile case of *Assange v The Swedish Prosecution Authority* [37] is significant not just for the character of the appellant but because the Supreme Court was split five to two on how the relevant EU and domestic legislation should be interpreted. The majority favoured an interpretation which in their eyes did not put the United Kingdom in breach of its international obligations under the Framework Decision on European Arrest Warrants taken by the Council of the EU on 13 June 2002. They did not think that Parliamentary material was admissible for consideration under the principles laid down in *Pepper v Hart* [38] because the need for a consistent EU-wide interpretation was paramount. Lord Mance and Lady Hale, dissenting, thought that the Framework Decision itself was ambiguous and that therefore *Pepper v Hart* did need to be used to try to determine the meaning which the UK Parliament had intended to give to it. Both sets of judges were therefore activist - the majority in wanting to make UK law consistent with EU law, the minority in wanting to use as much material as possible to determine the intention of Parliament. Given the great difficulties involved in making this latter determination, which have been well explored by Aileen Kavanagh, [39] it is fair to give credit to the majority on this occasion for their internationalism and preference for consistency. The minority's approach, with respect, seems rather parochial and artificial.

Strangely, just a week earlier Lord Mance and Lady Hale had adopted a more internationalist approach in a set of four appeals concerning extradition to Poland and the USA. [40] Each of them favoured a distinctly purposive approach to the interpretation of the relevant legislation. Indeed they supported using section 3 of the Human Rights Act 1998 to 'read down' section 108 of the Extradition Act 2003 (which requires appeals against extradition to be lodged within 14 days) to ensure that it complies with Article 6 of the ECHR. Relying on a distinction which had not previously been emphasised within Strasbourg's own jurisprudence, the Supreme Court unanimously held that decisions affecting the right of a UK citizen to remain in the UK were a determination of a civil right for the purposes of Article 6 and that therefore the 14-day rule should be applied in a manner which did *not* require all the details of the appeal to be filed and served within such a short time period. That in itself was a rather activist decision.

The Supreme Court has reached surprising conclusions regarding the interpretation of legislation on at least two further occasions. In *Serious Organised Crime Agency v Perry (No 2)* [41] it held by seven to two (Lord Judge CJ and Lord Clarke dissenting) that, having regard to the scheme and language of Part 5 of the Proceeds of Crime Act 2002 and to relevant principles of international law, the

jurisdiction of the High Court of England and Wales to make a civil recovery order extended only to property situated within England and Wales. This was contrary to the original policy intention behind the 2002 Act, which was enacted on the understanding that the proceeds of unlawful conduct are rarely held in just one country. The decision led to legislative reform through the Crime and Courts Act 2013 (except for Northern Ireland). [\[42\]](#) Just four months after *Perry*, another nine-judge Supreme Court held in *R v Waya* [\[43\]](#) that a confiscation order issued under the Proceeds of Crime Act 2002 was incompatible with Article 1 of Protocol 1 to the ECHR because it disproportionately interfered with the defendant's right to peaceful enjoyment of his possessions. The Justices reduced the amount being confiscated from £1.1 million to £392,000. As in the extradition cases mentioned above, this illustrates the Supreme Court's sensitivity to the requirements of the ECHR.

*Birmingham City Council v Abdulla* [\[44\]](#) is a further example, like *Perry*, of traditional interpretation techniques being used to arrive at an unexpected result. But it too contained two dissents, from Lords Sumption and Carnwath. The majority (Lords Wilson and Reed, and Lady Hale) found that it would not be right to exercise their discretion to strike out the respondents' equal pay claim in the High Court (where the limitation period is six years) on the ground that it could have been more conveniently disposed of in an employment tribunal (where the limitation period is six months). The main motivating factor seems to have been the strong desire to make a remedy available in a situation which appeared unjust. The dissenters, on the other hand, felt that such an approach 'frustrates the policy underlying the provisions of the Equal Pay Act relating to limitation' [\[45\]](#) and produces a result which cannot have been intended by Parliament. The decision made headlines in the national media, some of which suggested that it might even bankrupt local authorities because they were now open to huge back-dated claims by large groups of underpaid workers. [\[46\]](#)

In recent weeks the Supreme Court has had occasion to interpret the words 'reasonable' and 'reasonably' in activist ways, a sign, perhaps, that it is reluctant to allow such vague terms to conceal poor reasoning on the part of other decision-makers. In the much publicised decision on whether the Prince of Wales' correspondence with government departments should be disclosable under the Freedom of Information Act 2000, *R (Evans) v Attorney General*, [\[47\]](#) five Justices held that the Attorney General had not demonstrated that he had reasonable grounds for issuing a certificate that the government departments were entitled to refuse disclosure. Lords Wilson and Hughes dissented from that view. A week later, in *Nzolameso v City of Westminster*, [\[48\]](#) a five-judge bench (including Lord Hughes) found that the City of Westminster had not complied with its statutory duty under section 208(1) of the Housing Act 1986 to provide the applicant and her five children with accommodation in her own area 'so far as reasonably practicable'. In coming to that conclusion the judges were heavily influenced by another statutory duty placed on the authority by section 11(2) of the Children Act 2004, to have regard to the need to safeguard and promote the welfare of children. These two cases make the point that today's Supreme Court imposes onerous requirements on public authorities to provide a clear evidence-base for their decisions. In so far as this helps to ensure helpful guidance for future authorities they are good examples of judicial activism in operation.

#### **4. DEFYING THE GOVERNMENT'S SOCIAL, ECONOMIC OR FOREIGN POLICIES**

There have been numerous occasions - but not noticeably more so than during the last five years of the House of Lords - when the Supreme Court has decided a case in a way which defies the wishes of the government. An early example was *R (F) (A Child) v Secretary of State for Justice*, [\[49\]](#) where the Justices agreed with the two lower courts that a declaration of incompatibility needed to be issued in relation to section 82(1) of the Sexual Offences Act 2003 because, in breach of Article 8 of the ECHR, the subsection subjected all persons sent to prison for a sexual offence for at least 30 months



to a lifelong duty to keep the police informed of where they were living and of all their foreign travel; individuals had no time at any right to a review of the necessity for such notice requirements. Although the judgment attracted little publicity when it was first delivered, nearly a year later there was a huge backlash against it on the part of some politicians and newspapers. The Prime Minister, David Cameron, said in Parliament: 'I am appalled by the Supreme Court ruling. We will take the minimum possible approach to this ruling'. [\[50\]](#) He suggested, though without citing any empirical evidence, that requiring serious sexual offenders to sign the sex offenders register for life 'has broad support right across this House and right across the country'. [\[51\]](#)

In *ZH (Tanzania) v Secretary of State for the Home Department*, [\[52\]](#) reversing the Court of Appeal, the Supreme Court allowed an illegal immigrant to remain in the UK because she had since become a mother and requiring her to leave would disproportionately interfere with her right to respect for her family life under Article 8 of the ECHR. In effect, the state's interest in maintaining its immigration policy was allowed to be trumped by the best interests of a child. In *Zoumbas v Secretary of State for the Home Department* [\[53\]](#) a failed asylum seeker challenged the decision to deport him to the Republic of Congo because he had since married and had three children in the UK, but on this occasion the Supreme Court dismissed his appeal, finding that the Home Secretary did in fact pay proper regard to the interests of his children. It distinguished *ZH (Tanzania)* on the basis that there the child was a UK citizen whereas in *Zoumbas* the children were not. *ZH (Tanzania)* case was one of the decisions which prompted the government to amend the Immigration Rules in 2012 in an attempt to make it more difficult for illegal immigrants to take advantage of Article 8 in this way. [\[54\]](#) It followed this up with a change to the primary legislation in 2014, in the hope of making the change more impactful. [\[55\]](#)

In a related immigration context the government lost its appeal in *R (Aguilar Quila) v Secretary of State for the Home Department*, [\[56\]](#) where the Supreme Court held that the ban on the entry for settlement of foreign spouses or civil partners unless both parties were aged 21 or over, as set out in paragraph 277 of the Immigration Rules, was not a lawful way of deterring or preventing forced marriages because it breached the right to a family life under Article 8 of the ECHR. Lord Brown dissented, saying that this was a matter better left to elected politicians and that disapplying the Immigration Rules would go beyond what the European Court in Strasbourg currently expects.

The Supreme Court was again split, this time more significantly, in *R (Walumba Lumba (Congo)) 1 and 2 v Secretary of State for the Home Department* [\[57\]](#) where it held by six to three that the Home Secretary was liable to the two appellants for false imprisonment because they had been kept in detention pending deportation (in one case for 26 months and in the other for 50 months) pursuant to a policy which had been secretly changed. Shortly afterwards, in *R (SK (Zimbabwe)) v Secretary of State for the Home Department*, [\[58\]](#) the Supreme Court held that a failure to conduct regular reviews of detention, as required by Home Office policy, was also unlawful and that the persons affected by it were entitled to damages (though the Court said these would often be nominal).

The Supreme Court has demonstrated considerable activism concerning what has to be proved by asylum seekers when claiming that they would be subjected to persecution if returned to their home countries. The decision which stands out here is that which overturned the Court of Appeal in *HJ (Iran) v Secretary of State for the Home Department*, [\[59\]](#) where the Supreme Court unanimously held that homosexual asylum seekers could still be said to be in fear of persecution even if they could return home and hide their sexuality there. In a passionate lead judgment Lord Rodgers asserted that such a 'reasonable tolerability' test was incompatible with the Convention relating to the Status of Refugees of 1951 and its 1967 Protocol. The Supreme Court applied the same reasoning in a subsequent case where the issue was not an asylum seeker's sexual orientation but

his political beliefs (see *RT (Zimbabwe) v Secretary of State for the Home Department*). [60] Moreover, in *R (Jamar Brown (Jamaica)) v Secretary of State for the Home Department* [61] the Supreme Court held that the Home Secretary had acted unlawfully when she listed Jamaica as a state where there was in general no serious risk of persons entitled to reside there being persecuted. As Lord Hughes put it, '[i]n the present case ... the risk attaches to all who are homosexual, lesbian, bisexual or transsexual. That risk, as it seems to me, can only properly be described as a "general" risk in Jamaica'. [62]

However this sympathetic approach in asylum cases does not mean that the Supreme Court will necessarily make it easy for asylum seekers to win their cases. In another cases involving an Iranian, *IA (Iran) v Secretary of State for the Home Department* [63] the applicant had been granted refugee status by the UN High Commission for Refugees in both Iraq and Turkey but was then refused refugee status in the UK. According to the Supreme Court, dismissing the applicant's appeal, while the UNHCR's decisions deserved close attention, they did not create any presumption in favour of granting refugee status within the UK and nor did they shift the burden of proof to the state authorities to show that the UNHCR's decisions were wrong. If there was new evidence which contradicted that given by the applicant to the UNHCR, the UK authorities had to consider it.

The UK government failed to prevent the Supreme Court from endorsing the issue of a writ of *habeas corpus* in relation to a British citizen imprisoned at Guantanamo Bay. This was in *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs*, [64] where the government argued that the writ interfered with the UK's foreign relations. The seven Justices who heard the case were having none of this. As Lord Kerr (with whom Lords Dyson and Wilson agreed) put it:

The decision of the Court of Appeal that there were grounds on which it could be concluded that the Secretaries of State could exercise control over Mr Rahmatullah's custody and that they were therefore required to make a return to the writ does not entail an intrusion into the area of foreign policy. It does not require of the government that it take a particular foreign policy stance. It merely seeks an account as to whether it has in fact control or an evidence-based explanation as to why it does not. [65]

In a challenge to the government's welfare reform package, *R (Reilly) v Secretary of State for Work and Pensions*, [66] the Supreme Court affirmed the Court of Appeal's view that the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 were unlawful because they went beyond the powers conferred on the government by section 17A of the Jobseekers Act 1995.

Amongst the cases in which attempts to overturn existing government policy *failed* was *Patmalniece v Secretary of State for Work and Pensions*, [67] where (with Lord Walker dissenting) the Supreme Court affirmed the Court of Appeal's decision that the conditions of entitlement to state pension credit were compatible with a rule of EU law prohibiting discrimination between nationals of different EU states. The discrimination against a Latvian woman was justified because the Regulations in question (defining when someone is to be treated as a person 'in Great Britain') were a proportionate response to the legitimate aim of protecting the UK public purse, a justification that was independent of the claimant's nationality.

Most recently, and more starkly, in *R (SG) v Secretary of State for Work and Pensions* [68] the Supreme Court was forced to take a stand on whether the government's cap on welfare benefits, imposed by the Benefit Cap (Housing Benefit) Regulations 2012 and set at £350 per week for a single



claimant and £500 for other claimants, was unlawful under the Human Rights Act 1998 because it had an unjustifiably discriminatory impact on women in relation to their right to peaceful enjoyment of their possessions, contrary to Article 14 of the ECHR taken together with Article 1 of Protocol 1 to the ECHR. By three to two the Court held that the cap was not unlawful, because it was not a disproportionate way of achieving the aims of the legislation, which were to limit public expenditure on welfare benefits, address the perception that some people out of work were receiving benefits much higher than the earnings of people in work, and incentivise those who are out of work to find jobs. Lord Reed, as one of the majority (the others being Lord Hughes and Lord Carnwath), explained the position thus:

... the question of proportionality involves controversial issues of social and economic policy, with major implications for public expenditure. The determination of those issues is pre-eminently the function of democratically elected institutions. It is therefore necessary for the court to give due weight to the considered assessment made by those institutions. Unless manifestly without reasonable foundation, their assessment should be respected. [\[69\]](#)

The two judges in the minority (Lady Hale DP and Lord Kerr) thought that the discrimination in this case *was* without reasonable foundation because it was inconsistent with the best interests of the children affected by the cap. In Lady Hale's words:

It cannot possibly be in the best interests of the children affected by the cap to deprive them of the means to provide them with adequate food, clothing, warmth and housing, the basic necessities of life. It is not enough that children in general, now or in the future, may benefit by a shift in welfare culture. [\[70\]](#)

This difference of opinion in *SG* reflects strongly contrasting attitudes within the Supreme Court to two issues. First, it highlights that some Justices are more willing than others to use an international human rights treaty (here the UN Convention on the Rights of the Child) - ratified by the UK government but not incorporated into UK law - as a factor to be taken into account when measuring the proportionality of a measure taken by the government. Second, it emphasises that some Justices are more willing than others to make use of the concept of discrimination when assessing the legality of the government's economic and social policies.

A similar divergence of views is apparent from at least four other decisions. Firstly, in *A v Essex County Council* [\[71\]](#) the Supreme Court held by three to two (Lady Hale and Lord Kerr again dissenting) that an autistic person's right to education does not extend as far as a non-autistic person's right. The view of the majority (Lords Clarke, Phillips and Brown) was that Article 2 of Protocol 1 to the ECHR does not give someone with special educational needs an absolute right to an education which meets those needs if the failure to provide it is attributable to either a limit on resources or administrative shortcomings. [\[72\]](#)

Secondly, in *AB v Ministry of Defence* [\[73\]](#) the Supreme Court divided four to three against allowing nine ex-servicemen (representative of 1,002 other claimants) to sue the Ministry for exposing them to fallout radiation during nuclear tests in the South Pacific between 1952 and 1958. The majority (Lords Wilson, Walker, Brown and Mance) thought that the appellants had each reasonably believed, three years before issuing proceedings, that their injuries were capable of being attributed to the nuclear tests and, as they had no real prospect of establishing that radiation had caused their injuries, that it would be 'absurd' [\[74\]](#) to disapply section 11 of the Limitation Act 1980 and allow them to sue out of time. But the three dissenting judges (Lords Phillips and Kerr, and Lady Hale) thought that 'believing' something and 'knowing' something were two different concepts for the

purposes of the 1980 Act and that the actions should be allowed to continue because the appellants did not have the requisite knowledge three years before they issued proceedings. While at one level the case can be seen as a technical dispute over a point of statutory interpretation, it can also be viewed as a clash of attitudes towards access to justice. Lady Hale reminded the Court that the imposition of time limits on the bringing of legal proceedings:

... is a field in which statute has intervened for policy reasons. But in policy terms the current regime for personal injury claims, combining discoverability with discretion, might be thought to have the worst of all possible worlds ... In policy terms, the crucial question is whether a fair trial is still possible in the individual case, coupled with the ability to write off claims after a period of time. [75]

Thirdly, in *Michael v Chief Constable of South Wales Police*, [76] Lady Hale and Lord Kerr once again dissented within a bench of seven judges. The majority found that there was no basis for allowing a negligence claim to be brought against the police by relatives of a woman killed by her former partner who were of the view that the police had failed to respond appropriately to the victim's emergency call. [77] Lady Hale and Lord Kerr would have allowed the family's appeal because they thought the time had come to accept that in certain situations it is fair, just and reasonable to impose a duty of care on the police towards victims of crimes. [78]

Fourthly, in *R (Rotherham MBC) v Secretary of State for Business, Innovation and Skills*, [79] the Supreme Court divided again by four to three in holding that there had been no improper discrimination against Rotherham Council in the way in which EU Structural Funds had been allocated to it as compared with allocations to regions in Scotland and Northern Ireland. Those in the majority were Lords Sumption, Neuberger, Clarke and Hodge, while the dissenters were Lords Mance and Carnwath and Lady Hale.

It is also worth noting, in contrast with the *SG* case discussed above, that in *Humphreys v Commissioners for Her Majesty's Revenue and Customs* [80] all five Justices agreed (in a single judgment delivered by Lady Hale) that the government's scheme for paying child tax credit to the person mainly responsible for the child was not unjustifiably discriminatory against *men* because, although it might mean that a father would not be able to afford to care for his child in the same way as a mother, the overall aim of the scheme was to reduce child poverty and the state is entitled to conclude that children will be better off if the tax credit is distributed in this way rather than divided between two households with modest means. Similarly, in contrast with the *Rahmatullah* case discussed above, the Supreme Court was content to uphold the government's policy not to provide assistance with legal representation to Britons who find themselves facing criminal proceedings in a foreign country, even where, as in *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs*, [81] the applicant is a woman facing the death penalty in Indonesia. The five Justices who heard this appeal were all, in my estimation, on the more conservative wing of the Supreme Court - Lords Carnwath, Mance, Clarke, Toulson and Sumption. It is possible that a bench including Lady Hale DP, Lord Kerr and Lord Reed might have found a way of making the FCO's policy more humane. Just as remarkable as the conclusion in *Sandiford* is the Supreme Court's decision in *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department*, [82] where all but Lord Kerr held that the Home Secretary did not violate Article 10 of the ECHR when she refused permission to a dissident Iranian to come to the UK to speak to parliamentarians about the current situation in her country. The majority attempted to defend its stance by stressing that it had taken its own decision on the proportionality of the dissident's exclusion rather than just checking whether the decision by the Home Secretary was made lawfully, but some would say that the decision is still an affront to free speech.

In the realm of counter-terrorism measures the Supreme Court has by and large adopted a pro-government line. In *Bank Mellat v HM Treasury (No 1)* [83] it divided six to three in favour of holding that it had the inherent power to use a 'closed material procedure', even though it had no express statutory authority to do so. Those in the majority were Lord Neuberger, Lady Hale and Lords Clarke, Sumption, Carnwath and Dyson, while the dissenters were Lords Hope, Kerr and Reed. It is interesting that it was the three judges from Scotland and Northern Ireland who constituted the minority: perhaps they were naturally suspicious of the national apex court arrogating to itself potentially repressive powers? Lord Kerr further displayed his antipathy to excessive judicial power in *Tariq v Home Office* [84] where, alone amongst the eight Justices involved, [85] he held that even in employment tribunal proceedings it is necessary for a party to be provided with sufficient information about the allegations he or she is facing so that effective instructions can be given to a legal representative to challenge the allegations. On the other hand, in *Secretary of State for the Home Department v AP* [86] the Supreme Court held that requiring people who were subject to control orders to live hundreds of miles from their relatives was a violation of the right to liberty under Article 5 of the ECHR. This helped convince the government of the need to replace control orders with the less draconian 'terrorist prevention and investigation measures'. [87]

The Supreme Court has also adopted a hands-off approach towards the politically sensitive issue of voting rights for prisoners. In *R (Chester) v Secretary of State for Justice* [88] a seven-judge bench dismissed appeals on this matter by two life sentence prisoners. In doing so it applied the controversial decision of the European Court of Human Rights in *Hirst v UK (No 2)* [89] but it made no further declaration of incompatibility; it also ruled out the applicability of any EU law in this area and refused to make a reference to the Court of Justice of the EU for a preliminary ruling on the issue. The *Hirst (No 2)* decision is another one which made the Prime Minister physically ill, [90] and Parliament has so far held out against complying with the European Court's judgment. [91] Rather than increasing the pressure on the government and Parliament by issuing repeated declarations of incompatibility or awarding damages to murderers, the Supreme Court has chosen a more timid stance. In this context, no doubt believing that discretion is the better part of valour, the Court has certainly been more restrained than activist.

Taken in the round, and with the possible exception of immigration issues, in its five-and-a-half years to date the Supreme Court has been more deferential to government than confrontational. Whether this equates to judicial restraint as opposed to activism will to some commentators depend on their own views of government policies. For the purposes of this article, which is attempting to be value-neutral, the deference is a sign of (non-political) conservatism and restraint. The jurisprudence gives the impression of a Supreme Court tip-toeing its way through political minefields, not wanting to suggest that it is keen to play a larger constitutional role or to serve as some kind of unelected alternative government. To a great extent this is the same pose as was struck for well over a century by the Appellate Committee of the House of Lords. Given the British constitution, with its emphasis on parliamentary sovereignty, perhaps it is the stance which ultimately best promotes the independence and objectivity of the highest court.

## 5. DEVELOPING THE COMMON LAW

As may be already apparent from some of the cases discussed earlier, in its short life to date the Supreme Court seems to have become more and more conscious of the need to reassert the importance of human rights within the common law. This could be due to the Justices' perception that if and when the Human Rights Act 1998 is repealed (as the Conservative Party has vowed to do if it is in government after the election in May 2015) the common law will need to be in a fit state to fill the resulting gap in human rights protection. Alternatively, the Justices may simply be trying to

demonstrate that the idea of human rights, as reflected in the ECHR, is far from being one which is alien to the common law and that it therefore ought not to be treated disdainfully, as some British politicians are wont to do because they perceive it to be an idea imposed by Europe. Whether or not the 1998 Act is replaced with a 'British Bill of Rights', the Supreme Court may be quietly positioning itself to resurrect the common law as a source from which to develop human rights law in ways which will prevent much of a gap from opening up between the British way of protecting human rights and the Council of Europe's way.

Perhaps the outstanding example of the Supreme Court lauding the capacity of the common law to protect human rights is its decision in *R (Osborn) v Parole Board*, [\[92\]](#) where the sole judgment was delivered by Lord Reed. The decision greatly strengthens the right of prisoners to an oral hearing when the Parole Board is considering their applications for release on licence. The judgments is replete with statements to the effect that the Human Rights Act is not the only source of human rights in English law and that in some respects the well of human rights within the common law is deeper than that within the ECHR. For example:

The importance of the Act is unquestionable. It does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate. [\[93\]](#)

And again:

... the error in the approach adopted on behalf of the appellants in the present case is to suppose that because an issue falls within the ambit of a Convention guarantee, it follows that the legal analysis of the problem should begin and end with the Strasbourg case law. Properly understood, Convention rights do not form a discrete body of domestic law derived from the judgments of the European court. [\[94\]](#)

For other instances of this 'revisionist' approach by the Supreme Court to the common law of human rights - it is arguable that, while the common law has achieved a lot in terms of protecting civil liberties, it has never exalted the concept of human rights *as such* [\[95\]](#) - one could cite the decisions in *R v Horncastle* [\[96\]](#) (on whether the admission of hearsay evidence makes a criminal trial unfair), *Kennedy v The Charity Commission* [\[97\]](#) (on whether there is a right to receive information from public authorities) and *Moohan v Lord Advocate* [\[98\]](#) (on the right to the franchise), even though in the last two cases the Court could find no better protection for the rights in question within the common law than it could within the ECHR.

Lord Kerr has emerged as perhaps the strongest advocate for an approach to developing the common law in a way which gives great weight to human rights considerations, expects high standards of all public authorities and takes full account of people's varied vulnerabilities. As well as his dissents already noted in *SG, A v Essex CC*, *AB v Ministry of Defence*, *Michael v Chief Constable of South Wales Police*, *R (Lord Carlile)* and *Bank Mellat (No 1)*, he has asserted his approach in a number of other dissents. In *Sharif v Camden LBC* [\[99\]](#) he alone held that a housing authority's statutory duty to house people living together as a family in one unit [\[100\]](#) could not be complied with by providing the family with two flats separated by a corridor - one for a mother and her daughter and the other for her ill father. He thought that housing the individuals within 'sufficient proximity' of one another did not amount to allowing them to 'live together'. And in the Scottish appeal of *Ambrose v Harris* [\[101\]](#) Lord Kerr alone held that evidence supplied by a suspect before being given access to a solicitor is inadmissible in the suspect's subsequent trial, an approach to fair trial rights which even

goes beyond that adopted by the European Court of Human Rights. In his extra-judicial writings, especially his Clifford Chance Lecture in 2012, [\[102\]](#) Lord Kerr has convincingly argued that the Supreme Court should depart from the House of Lords' approach to the Human Rights Act as stated in *R (Ullah) v Special Adjudicator*, [\[103\]](#) where Lord Bingham asserted that '[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: *no more, but certainly no less*'. [\[104\]](#)

At the other end of the spectrum of approaches to developing the common law we can probably locate Lord Sumption. After being appointed to the Supreme Court directly from the bar, but before taking up his seat, he delivered a lecture in which he expressed his disagreement with the extent to which the Strasbourg Court had developed the concept of fundamental rights by deriving a large number of sub-principles and rules from the general principles of the ECHR. [\[105\]](#) As a Supreme Court Justice he has adopted a restrained approach to judicial law-making, as already witnessed in his dissent in the equal pay case of *Birmingham City Council v Abdulla*.

A number of high-profile appeals have provided evidence of the Supreme Court's willingness, or lack of it, to develop the common law more generally. In *Granatino v Radmacher* [\[106\]](#) a nine-judge court, with only Lady Hale dissenting, recognized for the first time that a pre-nuptial agreement can have legal effect: the old rule that agreements for the future separation of parties to a marriage were contrary to public policy was deemed to be obsolete. In *Jones v Kaney*, [\[107\]](#) as already noted, the Court reversed the common law rule that expert witnesses could not be sued for what they say in court. In *Fraser v HM Advocate* [\[108\]](#) the prosecution's non-disclosure of information to the defence in a Scottish criminal case was held to be a violation of Article 6 of the ECHR (the right to a fair trial). In *Jones v Kernott* [\[109\]](#) the Justices applied the principle of fairness when deciding how to distribute the joint assets of an unmarried couple when they split up after many years of cohabitation. In *Rabone v Pennine Care NHS Trust* [\[110\]](#) the Court went further than its Strasbourg counterpart and held that there was a right to an effective investigation of a death even in a situation where a mentally ill patient, having been sent home from hospital for the weekend, committed suicide. [\[111\]](#)

The highest-profile case of all in this context was probably *R (Nicklinson) v Ministry of Justice*, [\[112\]](#) on the subject of assisted suicide. It was the third time in 14 years that the issue had reached the highest UK court. In *R (Pretty) v DPP* [\[113\]](#) the House of Lords held that the DPP's decision to refuse to give an undertaking not to prosecute Mrs Pretty's husband for the offence of assisting her suicide was not a violation of Articles 2, 3, 8, 9 or 14 of the ECHR. When the case went to Strasbourg the Court there agreed with this outcome but pointed out that Article 8 rights were definitely engaged, contrary to the Law Lords' conclusion. [\[114\]](#) In *R (Purdy) v DPP*, [\[115\]](#) the last case ever decided by the Appellate Committee of the House of Lords, the appellant again lost on her main points, but she did win the right to have guidelines issued by the DPP as to the factors which would be taken into account before deciding whether to exercise the discretion to prosecute someone for assisting a suicide. In *Nicklinson* a bench of nine judges heard the case. Five Justices held that they did have the constitutional authority to make a declaration that the general prohibition on assisted suicide in section 2 of the Suicide Act 1961 was incompatible with Article 8 of the ECHR, but the majority of those five declined to make any such declaration in this case (Lords Neuberger, Mance and Wilson), while two would have granted it (Lady Hale and Lord Kerr). The other four judges thought that the whole matter was better left to Parliament's assessment (Lords Sumption, Hughes, Clarke and Reed). [\[116\]](#) Lord Toulson heard the case when it was at the Divisional Court and was firmly of the view that no declaration of incompatibility should be issued. In microcosm, the division of views in this case may be a fair reflection of where the 12 current Supreme Court Justices

sit on the activism-restraint spectrum. Lord Carnwath, had he sat in *Nicklinson*, is likely to have shared the position of those who thought they did have power to make a declaration but did not want to exercise it in this case. Lord Hodge may well have shared the position of his fellow Scot, Lord Reed. This means that of today's 12 Justices, six could be said to be restrained in their approach to judicial law-making (Lords Sumption, Clarke, Hughes, Toulson, Reed and Hodge), four are more willing to develop the law but are still mostly hesitant to do so (Lords Neuberger, Mance, Wilson and Carnwath), while two are very much in favour of doing so (Lord Kerr and Lady Hale).

But generalisations of this kind are very dangerous. Judges do not always behave as one might expect them to! Whether this is because they are unconsciously inconsistent in how they approach their law-making, or because they truly believe that as mere technocrats they arrive in every case at results which are the inevitable consequences of agreed premises, is both unclear and unknowable. It was probably no surprise that, in *R (Prudential plc) v Special Commissioner of Income Tax*, [117] when the question arose as to whether the concept of legal privilege should be extended to non-lawyers who sometimes do lawyers' work, such as accountants who give advice about tax law, five Justices (Lords Neuberger, Walker, Hope, Mance and Reed) held that it should not be extended (and that any such reform was better left to Parliament) while Lords Sumption and Clarke held that it should. Generally speaking Lords Sumption and Clarke seem to be in favour of reducing the scope of liability under the common law. Similarly, in *Vestergaard Frandsen A/S v Bestnet Europe Ltd*, [118] when rejecting a company's claim against a former employee for breach of confidence, all five Justices (Lords Neuberger, Reed, Sumption, Clarke and Carnwath) were of the view that the law should not discourage former employees from benefiting society and advancing themselves by imposing unfair potential difficulties on their honest attempts to compete with former employers. But less than six months later, in *Woodland v Swimming Teachers Association*, [119] a mostly conservative bench held unanimously (Lords Sumption, Clarke, Wilson and Toulson, with Lady Hale) that a local education authority did owe a non-delegable duty of care to a pupil to secure that reasonable care was taken of her when she was brought to locations away from her school. The Court said that imposing such a duty was fair, just and reasonable, even when the school had delegated its educational function and control over the pupil to an independent contractor. It may be the fact that the victim in this case was a child which swayed some otherwise restrained judges to be activist.

## 6. CONCLUSION

Pinning labels on judges is often unfair, and pinning them on whole courts is doubly so. Even when a court is almost entirely in charge of its own docket, [120] as the UK Supreme Court now is, there is a great deal of randomness regarding the issues which are brought to it by way of applications for permission to appeal. The judges are also very much constrained by the specific facts of the appeals in question, and sometimes by concessions which have been made by the parties' lawyers. In addition, judges can be persuaded to change their initial opinion on a case by the force of the arguments put to them by barristers representing the opposing point of view, or the view of an intervener. As Alan Paterson has so ably demonstrated, judges may also change one another's minds during their post-hearing deliberations. [121] In any event, it is doubtful if many judges are conscious that favouring a particular result in case A may leave him or her open to criticism for not having favoured a particular result in case B, especially if the cases concern different areas of the law and are therefore unlikely to be cited together in any future case. Many judges, I feel certain, do not have a personal 'judicial philosophy', at least not one which dictates with any degree of precision how they go about deciding individual cases. Likewise, it is unlikely that when they all meet together the Supreme Court Justices discuss what role the Court as a whole should play. [122] Judging is an



intensely personal occupation and each individual must decide for him- or herself how best to perform it.

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[1] Queen's University of Belfast.

[2] See generally B Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (2007, Oxford University Press).

[3] Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* 2013, (Hart Publishing).

[4] [2010] UKSC 28.

[5] [1987] 1 WLR 1425.

[6] [1966] 1 WLR 1448.

[7] [2008] UKHL 70.

[8] [1966] 1 WLR 1234.

[9] [2008] UKHL 70, [25].

[10] *Ibid*, [28].

[11] Though it seems to have been shared by a leading writer in the field: in *The Law-Making Process* (7th edn, 2015, Hart Publishing, at 209-212) Michael Zander takes it for granted that the Supreme Court should follow the House of Lords' Practice Statement.

[12] [2011] UKSC 13.

[13] [1905] AC 480.

[14] *Ibid*, [175].

[15] [2014] UKSC 20.

[16] [2012] UKSC 4.

[17] [2011] UKSC 60.

[18] 1997 SC (HL) 105.

[19] [2013] UKSC 41.

[20] [2010] UKSC 29.

[21] (2011) 53 EHRR 18.

[22] [2014] UKSC 31.

[23] [2003] UKHL 60.

[24] [2014] UKSC 45.

[25] (1862) 10 HL Cas 26.

[26] [2014] UKSC 66.

[27] [2009] UKSC 22.

[28] (2012) 556 EHRR 399.

[29] [2015] UKSC 11.

[30] [1985] AC 871.

[31] That standard was itself laid down by the House of Lords in an earlier case, *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

[32] [2013] UKSC 77.

[33] [1970] 2 QB 697.

[34] The results of applications can be checked on the Supreme Court's website at <https://www.supremecourt.uk/news/permission-to-appeal.html>.

[35] This is the phrase used by the Court to give itself leeway to change its mind on whether to grant permission to appeal in a similar future case.

[36] [2011] UKSC 3.

[37] [2012] UKSC 22.

[38] [1993] AC 593.

[39] 'The role of parliamentary intention in adjudication under the Human Rights Act 1998' (2006) 26*OJLS* 179.

[40] *Pomieczowski v District Court of Legnica, Poland* [2012] UKSC 20.

[41] [2012] UKSC 35.

[42] Crime and Courts Act 2013, ss 48 and 49 and Schs 18 and 19.

[43] [2012] UKSC 51.

[44] [2012] UKSC 47.

[45] *Ibid*, [36].

[46] See eg [www.bbc.co.uk/news/uk-england-birmingham-20294633](http://www.bbc.co.uk/news/uk-england-birmingham-20294633) and for a recent socio-legal exploration of the decision see Simon Deakin et al, 'Are litigation and collective bargaining complements or substitutes for achieving gender equality? A study of the British Equal Pay Act' (2015) 39 *Camb J Econ* 381.

[47] [2015] UKSC 21.

[48] [2015] UKSC 22.

[49] [2010] UKSC 17.

[50] HC Debs, Vol 523, col 955 (16 February 2011).

[51] Ibid. The incompatibility with Convention rights was eventually removed by the Sexual Offences Act 2003 (Remedial) Order 2012 (SI 1883).

[52] [2011] UKSC 4.

[53] [2013] UKSC 74.

[54] Immigration Rules on Family and Private Life, HC 194.

[55] The Immigration Act 2014, s 19, inserted a new Part 5A (ss 117A-117D) into the Nationality, Asylum and Immigration Act 2002 expressly setting out what public interest considerations must be taken into account under Art 8 of the ECHR when a court or tribunal is making a decision under the Immigration Acts. Under s 117C greater considerations are to be taken into account in cases involving the deportation of foreign criminals.

[56] [2011] UKSC 45.

[57] [2011] UKSC 12.

[58] [2011] UKSC 23.

[59] [2010] UKSC 31.

[60] [2012] UKSC 38.

[61] [2015] UKSC 8.

[62] Ibid, [36].

[63] [2014] UKSC 6.

[64] [2012] UKSC 48.

[65] Ibid, [68].

[66] [2013] UKSC 68.

[67] [2011] UKSC 11.

[68] [2015] UKSC 16.

[69] Ibid, [93].

[70] Ibid. [226].

[71] [2010] UKSC 33.

[72] Yet in *R (KM) v Cambridgeshire County Council* [2012] UKSC 23 a seven-judge Supreme Court (Lady Hale and Lord Kerr concurring) held that the way a local authority had allocated resources to a disabled man was rational, given the council's own financial pressures.

[73] [2012] UKSC 9.

[74] Per Lord Wilson at [27].

[75] Ibid, [164].

[76] [2015] UKSC 2.

[77] All seven judges did, however, agree that the family could pursue a claim against the police based on their alleged breach of the victim's right to life under the Human Rights Act.

[78] This means that the two dissenters would have departed from, or at least distinguished, the House of Lords' decisions in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 and *Van Colle v Chief Constable of the Hertfordshire Police* [2009] AC 225.

[79] [2015] UKSC 6.

[80] [2012] UKSC 18.

[81] [2014] UKSC 44.

[82] [2014] UKSC 60.

[83] [2013] UKSC 38.

[84] [2011] UKSC 35.

[85] Including Lady Hale. The ninth judge, Lord Rodger, died before judgment could be delivered but had indicated that he agreed with Lords Mance and Brown: *ibid*, [164].

[86] [2010] UKSC 24.

[87] Under the Terrorism Prevention and Investigation Measures Act 2011.

[88] [2013] UKSC 63.

[89] (2006) 42 EHRR 41. The Strasbourg adopted the same position in *Frith v UK* (App No 47784/09, judgment of 12 August 2014) and *McHugh v UK* (App No 51987/08, judgment of 10 February 2015), but awarded no compensation to the applicants.

[90] HC Debs, vol 517, col 921 (3 November 2010).

[91] On 10 February 2011 the House of Commons voted by 234 to 22 to retain the ban on prisoners voting, notwithstanding the judgments of the European Court of Human Rights: HC Debs, vol 523, cols 493-586. See generally A Horne and I White, 'Prisoners' Voting Rights', House of Commons Standard Note SN/PC/01764, 11 February 2015.

[92] [2013] UKSC 61.

[93] *Ibid*, [57].

[94] *Ibid*, [63]. At [56] Lord Reed added: 'The Convention taken by itself is too inspecific (sic) to provide the guidance which is necessary in a state governed by the rule of law ... The Convention cannot therefore be treated as if it were Moses and the prophets.'

[95] See B Dickson, *Human Rights and the United Kingdom Supreme Court* (2013, Oxford University Press) 33-34.

[96] [2009] UKSC 14.

[97] [2014] UKSC 20.

[98] [2014] UKSC 67.

[99] [2013] UKSC 10.

[100] Housing Act 1996, ss 175-176.

[101] [2011] UKSC 43.

[102] 'The UK Supreme Court: the modest underworker of Strasbourg?', 25 January 2012, available at [https://www.supremecourt.uk/docs/speech\\_120125.pdf](https://www.supremecourt.uk/docs/speech_120125.pdf).

[103] [2004] UKHL 26.

[104] Ibid, [20] (emphasis added).

[105] 'Judicial and political decision-making: the uncertain boundary', The FA Mann Lecture, available at [www.legalweek.com/digital\\_assets/3704/MANNLECTURE\\_final.pdf](http://www.legalweek.com/digital_assets/3704/MANNLECTURE_final.pdf). See esp. pp 7 and 13.

[106] [2010] UKSC 12.

[107] [2011] UKSC 13.

[108] [2011] UKSC 24.

[109] [2011] UKSC 53.

[110] [2012] UKSC 2.

[111] The European Court of Human Rights later adopted the same approach itself, in *Reynolds v UK* (2012) 55 EHRR 35. See too Lady Hale's Warwick Law Lecture, 'What's the point of human rights?', 28 November 2013, available at <https://www.supremecourt.uk/docs/speech-131128.pdf>.

[112] [2014] UKSC 38.

[113] [2001] UKHL 61.

[114] *Pretty v UK* (2002) 35 EHRR 1.

[115] [2009] UKHL 45.

[116] Lord Judge CJ and Lord Dyson MR heard the case in the Court of Appeal; they too would have denied any relief to the applicants.

[117] [2013] UKSC 1.

[118] [2013] UKSC 31.

[119] [2013] UKSC 66.

[120] The Court of Appeal can give permission to appeal to the Supreme Court in civil cases, but rarely does so, preferring to let the Supreme Court decide for itself which appeals to hear. References of devolution issues to the Supreme Court must, however, be dealt with by that court, however reluctantly.

[121] Alan Paterson, n 3 above, 83-121.

[122] Which is not to deny Paterson's evidence that there is more collaborative team-working and interactive dialogue: *ibid*, 313-4.